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12
13 **IN THE UNITED STATES DISTRICT COURT**
14 **FOR THE DISTRICT OF ARIZONA**

15 B.A.D.J., on her own behalf and on behalf
16 of her minor child X.B.J.A.,

17 Plaintiff,

18 v.

19 United States of America,

20 Defendant.

21 No. CV-21-00215-PHX-SMB

22 **RESPONSE TO PLAINTIFFS'
23 SECOND MOTION TO TRANSFER
24 TO JUDGE SUSAN BOLTON
25 PURSUANT TO LOCAL RULES OF
26 CIVIL PROCEDURE 42.1**

27 Defendant United States of America, through undersigned counsel, respectfully
28 submits this memorandum in response to Plaintiffs' second motion pursuant to Local Rules
of Civil Procedure ("LRCiv") 42.1(a) to transfer this action to the Honorable Susan R.
Bolton (the "Motion") (Doc. 39). The United States identifies a few points below that may
be relevant to the Court's decision but takes no position on the Motion and defers to the
Court in managing its docket with respect to this litigation and the large number of cases
that could arise in the District of Arizona.

29 **BACKGROUND AND PROCEDURAL HISTORY**

30 On February 8, 2021, Plaintiff B.A.D.J. commenced this action, on behalf of herself
31 and her eight-year-old child X.B.J.A., against the United States. *See* Complaint, *B.A.D.J.*
32 *v. United States*, No. 2:21-cv-00215-SMB (D. Ariz. Feb. 8, 2021), ECF No. 1 ("B.A.D.J.
33 Compl."). According to the Complaint, Plaintiff and her daughter crossed into the United
34 States at or near the city of San Luis, Arizona, in May 2018, where they were apprehended

1 by U.S. Customs and Border Patrol (“CBP”) agents and taken into custody. *Id.* at ¶¶ 88-89.
 2 Plaintiff alleges that, while in federal custody, she and her daughter were subjected to
 3 improper treatment by CBP agents and other immigration officials, forced to sign
 4 documents related to their detention and immigration charges, and subjected to inhumane
 5 conditions of confinement. *Id.* at ¶¶ 91-93, 97-103.

6 According to the Complaint, on their third day in CBP custody, Plaintiff was
 7 separated from her daughter. *Id.* at ¶ 105. Plaintiff was then detained at a CBP facility in
 8 Yuma, Arizona; she was then transferred to a CBP facility in Wellton, Arizona; then to a
 9 facility named Santa Cruz; and then to an Immigration and Customs Enforcement (“ICE”)
 10 facility in Ocilla, Georgia. *Id.* at ¶ 125. Plaintiff alleges that during her detention in
 11 Georgia she “began having chest pains, headaches, and difficulty breathing due to the
 12 immense stress of her separation from [her daughter], lack of sleep, scant intake of food
 13 and water, and the other inhumane conditions of her detention.” *Id.* at 136. She also
 14 received medical treatment and a credible-fear interview while detained in Georgia. *Id.* at
 15 ¶¶ 137-140. After an immigration judge denied bond, Plaintiff signed her removal order
 16 to El Salvador. *Id.* at ¶ 143. Within weeks of her removal, on or about December 17, 2018,
 17 Plaintiff again crossed into the United States, after which she was apprehended by CBP
 18 agents and removed from the United States for a second time. *Id.* at ¶¶ 144-145.

19 On May 11, 2018, Plaintiff’s daughter, X.B.J.A., was placed in the care of the
 20 Department of Health and Human Services, Office of Refugee Resettlement (“ORR”), in
 21 accordance with federal immigration statutes. More specifically, Plaintiff’s daughter was
 22 placed in an ORR facility in Florida, where she spent two weeks, before being reunited
 23 with her father in California. *Id.* at ¶¶ 121-122. Plaintiff’s daughter currently lives with
 24 her father in California, while Plaintiff is currently in El Salvador. *Id.* at ¶ 147.

25 **C.M. v. United States.** *C.M.* was filed in September 2019 and is currently pending
 26 before Judge Bolton. *See* Complaint, *C.M. v. United States*, No. 2:19-cv-05217-SRB (D.
 27 Ariz. Filed Sept. 9, 2019), ECF No. 1 (“*C.M. Compl.*”). The plaintiffs in *C.M.* are five
 28 mothers, who sued on behalf of themselves and their respective five minor children,

1 alleging that they were separated from their children after crossing into the United States
 2 in Arizona, in May 2018, and taken to a Border Patrol station in Arizona. *See C.M. Compl.*
 3 ¶¶ 71, 119, 121, 171-72, 236, 305. The *C.M.* plaintiffs allegedly were then sent to different
 4 secure detention facilities in Arizona, Nevada, and California. *Id.* at ¶¶ 86, 89, 137-138,
 5 140-141, 194, 256, 258, 273, 331, 339. The *C.M.* plaintiffs' children were then, in
 6 accordance with federal immigration statutes, placed in various and different care facilities
 7 by ORR, including facilities in New York and Arizona. *Id.* at ¶¶ 100, 152, 211, 281, 355.
 8 The *C.M.* plaintiffs and their children were reunited at the South Texas Family Residential
 9 Center in Dilley, Texas. *Id.* at ¶¶ 112, 166-68, 230, 232, 371, 376-80.

10 ***A.P.F. v. United States.*** *A.P.F.* was filed in January 2020 and is currently pending
 11 before Judge Bolton. *See* Complaint, *A.P.F. v. United States*, No. 2:20-cv-00065-SRB (D.
 12 Ariz. Filed Jan. 10, 2020), ECF No. 1. The plaintiffs in *A.P.F.* are six noncitizen fathers,
 13 who sued on behalf of themselves and their respective six minor children, alleging that they
 14 were separated from their children after crossing into the United States in Arizona, where
 15 they were encountered by CBP agents and taken into custody. *See* Amended Complaint at
 16 ¶¶ 86-91, 113, 182, 193, 203, 265-266, 273, 308-309, 317, 369-371, 377, 413, 418, 424,
 17 *A.P.F. v. United States*, No. 2:20-cv-00065-SRB (D. Ariz. Filed June 16, 2020), ECF No.
 18 34 (“*A.P.F. FAC*”). The *A.P.F.* plaintiffs were then transferred to the custody of ICE and
 19 allegedly sent to different secure detention facilities in Arizona, Georgia, and Texas. *Id.* at
 20 ¶¶ 32-43, 122, 210-215, 277-281, 293. Their children were placed in various care facilities
 21 by ORR, including facilities in New York, Texas, and Michigan. *Id.* at ¶¶ 32-43. The
 22 *A.P.F.* plaintiffs and their children were later reunited after separation periods allegedly
 23 spanning from eight weeks to more than eight months. *Id.* at ¶¶ 32, 34, 36, 39, 41, 43.

24 On March 15, 2021, Plaintiff B.A.D.J. filed a motion pursuant to LRCiv 42.1(a) to
 25 transfer this action to Judge Bolton. *See* Motion to Transfer, *B.A.D.J. v. United States*, No.
 26 2:21-cv-00215-SMB (D. Ariz. Mar. 15, 2021), ECF No. 10. The United States filed a
 27 response, noting a few points that may be relevant to the Court’s decision, but ultimately
 28 taking no position and deferring to the Court on Plaintiff’s initial motion to transfer. *See*

1 Response to Motion to Transfer, *B.A.D.J. v. United States*, No. 2:21-cv-00215-SMB (D.
 2 Ariz. Mar. 15, 2021), ECF No. 23. On May 10, 2021, the United States filed a motion to
 3 dismiss this action pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of
 4 subject-matter jurisdiction or, in the alternative, pursuant to Federal Rules of Civil
 5 Procedure 8(a)(2) and 12(b)(6) for failure to state a claim. United States' Motion to
 6 Dismiss, *B.A.D.J. v. United States*, No. 2:21-cv-00215-SMB (D. Ariz. May 10, 2021), ECF
 7 No. 27. Shortly thereafter, this action and the *C.M.* and *A.P.F.* cases were stayed in light
 8 of settlement negotiations. *See Order*, *B.A.D.J. v. United States*, No. 2:21-cv-00215-SMB
 9 (D. Ariz. May 20, 2021), ECF No. 29; *Order*, *C.M. v. United States*, No. 2:19-cv-
 10 05217SRB (D. Ariz. May 3, 2021), ECF No. 105; *Order*, *A.P.F. v. United States*, No. 2:20-
 11 cv-00065-SRB (D. Ariz. May 3, 2021), ECF No. 102. In light of all three cases being
 12 stayed, on June 22, 2021, Judge Bolton denied without prejudice Plaintiff's initial motion
 13 to transfer. *Order*, *B.A.D.J. v. United States*, No. 2:21-cv-00215-SMB (D. Ariz. June 22,
 14 2021), ECF No. 31. Since then, the stay in this case has expired, *see Order*, *B.A.D.J. v.*
 15 *United States*, No. 2:21-cv-00215-SMB (D. Ariz. Nov. 18, 2021), ECF No. 37, and the
 16 stays in *C.M.* and *A.P.F.* have been lifted, *see Order*, *C.M. v. United States*, No. 2:19-cv-
 17 05217-SRB (D. Ariz. Dec. 21, 2021), ECF No. 118; *Order*, *A.P.F. v. United States*, No.
 18 2:20-cv-00065-SRB (D. Ariz. Dec. 21, 2021), ECF No. 117.

19 **LEGAL STANDARD**

20 Under Local Rule of Civil Procedure 42.1(a), a party may move to transfer two or
 21 more different cases to a single judge when the party believes that the cases (1) "arise from
 22 substantially the same transaction or event;" (2) "involve substantially the same parties or
 23 property;" (3) "call for determination of substantially the same questions of law;" or
 24 (4) "for any other reason would entail substantial duplication of labor if heard by different
 25 Judges." When considering a motion under LRCiv 42.1(a), "[a] principal factor is whether
 26 party economy or judicial economy is substantially served by transfer to another judge."
 27 *Cagle v. Ryan*, No. CV-16-03912-PHX-JAT-JFM, 2018 WL 2688775, at *1 (D. Ariz. June
 28 5, 2018) (internal quotations omitted).

These factors “are not binding on the Court’s ultimate decision to grant or deny the motion.” *Smith v. Sperling*, No. 11-0722-PHX-PGR, 2011 WL 4101508, at *1 (D. Ariz. Sept. 14, 2011). Rather, the Court retains “broad discretion regarding the assignment or reassignment of cases.” *Badea v. Cox*, 931 F.2d 573, 575 (9th Cir. 1991) (internal citation and quotations omitted); *Dishon v. Gorham*, No. CV-16-04069-PHX-ROS, 2018 WL 4257936, at *4 (D. Ariz. Sept. 6, 2018).

ARGUMENT

The United States takes no position on the pending Motion and defers to the Court on its application of the LRCiv 42.1(a) factors but offers some points that may be relevant to the Court's application of those factors and the instant Motion.

1. “Transaction or Event”

This case, like *C.M.* and *A.P.F.*, involves claims of family separation as a result of the government’s enforcement of federal immigration law. The separations at issue are alleged to have been the result of the same high-level policy determinations. But there are also differences between the different cases. For example, Plaintiff here alleges that her daughter should have been reunited with her husband, *see B.A.D.J. Compl.* ¶ 122, while the plaintiffs in *C.M.* and *A.P.F.* generally allege that their children should have been more expeditiously reunited with the plaintiffs themselves, *see C.M. Compl.* ¶¶ 4, 53; *A.P.F. FAC* ¶ 524. The length of separation is also different: In this case, plaintiff’s daughter was separated from her parents for approximately “two weeks,” *B.A.D.J. Compl.* ¶ 122, while the minors in *C.M.* and *A.P.F.* were separated for “more than two months” and “periods ranging from around eight weeks to around eight months,” respectively, *see C.M. Compl.* ¶ 5; *A.P.F. FAC* ¶ 524.

Moreover, each case features different allegations of mistreatment and improper conditions of confinement both before and after plaintiffs' separation. For example, Plaintiff here alleges that she was detained in Ocilla, Georgia, where she "began" experiencing immense stress due to the separation *as well as* "the other inhumane conditions of her detention." *B.A.D.J.* Compl. ¶¶ 26, 125-136. No plaintiff in *C.M.* or

1 *A.P.F.* was detained in the ICE detention facility in Ocilla, Georgia, and therefore the
 2 conditions at that facility are not relevant to those cases. Further, the Plaintiff here alleges
 3 improper conduct and inhumane conditions upon her initial intake by CBP and prior to
 4 separation, allegations that are unique to this case. *Id.* at ¶¶ 91-93, 97-103. Additionally,
 5 Plaintiff alleges that her child was placed in an ORR facility in Florida. *Id.* at ¶¶ 121-122.
 6 In contrast, none of the children in *C.M.* or *A.P.F.* were placed in an ORR facility in Florida,
 7 and facts relating to that facility or its efforts at reunification will not be relevant in those
 8 cases. *See A.P.F. FAC ¶¶ 32-43, 122, 210-215, 277-281, 293; C.M. Compl. ¶¶ 18-19.*
 9 Finally, unlike the allegations at issue in *A.P.F.*, this case does not involve allegations of
 10 abuse at an ORR facility in New York. *A.P.F. FAC ¶¶ 93-95, 139-141, 279, 454.*

11 **2. Parties or Property**

12 Although this case and the *C.M.* and *A.P.F.* cases involve a common defendant, the
 13 United States, all three cases involve different plaintiffs. In similar circumstances, this
 14 Court has held that the presence of a common government defendant is insufficient to meet
 15 LRCiv 42.1(a)'s prong requiring "substantially the same parties." *See Pangerl v. Ehrlich*,
 16 No. CV06-1464 PHXMHM, 2007 WL 686703, at *3 (D. Ariz. Mar. 2, 2007). The cases
 17 do not involve common property.

18 **3. Questions of Law**

19 This case and the *C.M.* and *A.P.F.* cases present similar state law causes of action
 20 for negligence and intentional infliction of emotional distress under the Federal Tort
 21 Claims Act, 28 U.S.C. §§ 1346(b)(1), 2671-2680 ("FTCA"). *B.A.D.J. Compl. ¶¶ 161-70;*
 22 *C.M. Compl. ¶¶ 387-93; A.P.F. FAC ¶¶ 527-48.*¹ There is also some overlap between the
 23 legal defenses presented in this case and the *C.M.* and *A.P.F.* cases, including whether a
 24 court has subject-matter jurisdiction of a plaintiff's challenge to the government's
 25 enforcement of federal immigration law and resulting separation of families.

26 But there are also differences between the legal issues presented in this case vis-à-
 27 vis *C.M.* and *A.P.F.* As an initial matter, it is not the case that "nearly every legal argument

28 ¹ As noted in the Motion, Plaintiff here and the plaintiffs in *A.P.F.* also raise a claim of loss
 of consortium under the FTCA. *B.A.D.J. Compl. ¶¶ 171-74; A.P.F. FAC ¶¶ 549-54.*

1 raised in the [United States'] motion to dismiss has already been before this Court in *C.M.*
 2 and *A.P.F.*" Motion at 7. Rather, the United States' motion to dismiss in this case will
 3 require the Court to consider and decide different legal issues than the motions to dismiss
 4 that the government filed in the *C.M.* and *A.P.F.* cases. For example, as Plaintiff
 5 acknowledges in the Motion, the United States' motion to dismiss in this case raises two
 6 arguments that the government did not raise at the motion to dismiss stage in either the
 7 *C.M.* or *A.P.F.* case: (1) Plaintiff's claims are barred because the FTCA does not waive the
 8 United States' sovereign immunity for institutional tort claims, and (2) Plaintiff fails to
 9 allege facts sufficient to state a claim for negligence under Fed. R. Civ. P. 8(a)(2) and
 10 12(b)(6). Motion at 7 n.2; *see also* Motion to Dismiss, *B.A.D.J.*, ECF No. 27 at 18-19 and
 11 20-22. Both arguments present legal questions that were not before the Court in *C.M.* or
 12 *A.P.F.* *See C.M. v. United States*, No. CV-19-05217-PHX-SRB, 2020 WL 1698191, at *2-
 13 4 (D. Ariz. March 30, 2020); *A.P.F. v. United States*, 492 F. Supp. 3d 989 (D. Ariz. 2020).

14 It is also important to note that, in denying the United States' motions to dismiss in
 15 the *C.M.* and *A.P.F.* cases, the Court held that the government could not avail itself to the
 16 "discretionary function exception" to the FTCA because the plaintiffs in those cases
 17 "plausibly alleged that the government's separation of their families violated their
 18 constitutional rights." *A.P.F.*, 492 F. Supp. 3d at 996; *C.M.*, 2020 WL 1698191, at *4.
 19 Here, Plaintiff does not allege in the Complaint that the government violated any provision
 20 of the Constitution in separating her from her daughter. *See* Motion to Dismiss, *B.A.D.J.*,
 21 ECF No. 27 at 11 n.7; *see also generally* *B.A.D.J.* Compl. This is a distinction between
 22 the government's discretionary function exception argument in this case and its arguments
 23 in *C.M.* and *A.P.F.*, which will require the Court to address and resolve different legal
 24 questions than those presented in the *C.M.* and *A.P.F.* cases.

25 Moreover, once the Court is past the legal assessment of threshold arguments,
 26 Plaintiff's FTCA claims for negligence, intentional infliction of emotional distress, and
 27 loss of consortium will focus on individualized facts, including the actions of the specific
 28 federal agents in applying those national policies, as well as the actions of officers who

1 encountered Plaintiff during her detention and the actions of the specific ORR employees
 2 who encountered Plaintiff's daughter during periods of custody after separation. For example, as the Court has noted, "whether the government intentionally inflicted emotional
 3 distress, acted negligently, or caused the loss of a child's consortium ... will turn on events
 4 occurring after [Plaintiff] entered the country—namely, the government's treatment of
 5 [Plaintiff] at and after the time of separation." Order, *A.P.F.*, ECF No. 33 at 4.

7 While the government agrees that the overlap in legal issues across these cases
 8 might weigh in favor of transfer, transfer may not be appropriate where there are substantial
 9 factual differences between the cases, even if "there may be some overlap in at least one
 10 of the legal issues." *Lexington Ins. Co. v. Scott Homes Multifamily, Inc.*, No. CV-12-
 11 02119-PHX-JAT, 2013 WL 4026883, at *2 (D. Ariz. Aug. 7, 2013); *Lopez v. I-Flow Inc.*,
 12 No. CV-08-1063-PHX-SRB, 2009 WL 5574373, at *3 (D. Ariz. May 8, 2009); *Cooke v.*
 13 *Town of Colorado City, Ariz.*, No. CV 10-08105- PCT-JAT, 2012 WL 5835401, at *2 (D.
 14 Ariz. Nov. 16, 2012). For example, in *Lopez v. I Flow Inc.*, the court declined to transfer
 15 a case involving the same "legal defenses" and "causes of action," holding that "factual
 16 differences"—each plaintiff's individual "medical history" and "alleged damages"—will
 17 "result in different legal analysis and individualized issues related to liability and
 18 causation." See *Lopez*, 2009 WL 5574373, at *3.

19 4. **Judicial Economy**

20 The United States defers to the Court on whether transfer is likely to serve judicial
 21 economy or conserve judicial resources. The government recognizes the importance of
 22 ensuring judicial economy in handling the twenty FTCA cases filed in federal courts across
 23 the nation addressing the impact of these policies on individuals, and in potentially
 24 handling the hundreds of tort claims pending before federal agencies that could result in
 25 litigation. Many of the pending lawsuits and administrative claims stem from separations
 26 that occurred in Arizona, and the Court may want to consider this larger picture in
 27 determining how to manage those cases being filed in the District of Arizona.
 28 Consolidation of some matters at the appropriate time might increase efficiency,

1 particularly where different suits could be consolidated or briefed in parallel. At the same
 2 time, the Court could conclude that it would not serve judicial economy to transfer every
 3 such case to a single judge—particularly if the cases are at very different stages—and that,
 4 instead, “a division of labor between” Judges in this District could be “more conducive to
 5 judicial economy than would transfer to a single Judge.” *S.E.C. v. Fraser*, No. CR-09-
 6 00365-PHX-FJM, 2009 WL 1327756, at *2 (D. Ariz. May 13, 2009) (declining to transfer
 7 civil case).

8 The Court may also want to consider that six lawsuits arising out of family
 9 separations at the Southwest border are currently pending before five different Judges in
 10 the District of Arizona. *See C.M. v. United States*, No. 2:19-cv-05217 (D. Ariz. Filed Sept.
 11 9, 2019) (Bolton, District Judge); *A.P.F. v. United States*, No. 2:20-cv-00065 (D. Ariz.
 12 Filed Jan. 10, 2020) (Bolton, District Judge); *B.A.D.J. v. United States*, No. 2:21-cv-00215
 13 (D. Ariz. Filed Feb. 8, 2021) (Brnovich, District Judge); *A.I.I.L. v. Sessions et al.*, No. 4:19-
 14 cv-00481 (D. Ariz. Am. Compl. Filed Sept. 3, 2020) (Hinderaker, District Judge); *F.R. v.*
 15 *United States*, No. 2:21-cv-00339 (D. Ariz. Filed Feb. 25, 2021) (Rayes, District Judge);
 16 *E.S.M. v. United States*, No. 4:21-cv-00029 (D. Ariz. Filed Jan. 1, 2021) (Soto, District
 17 Judge). Although Plaintiff suggests that it would be “a needless expenditure of judicial
 18 resources when one judge within the District must analyze and decide factual and legal
 19 issues with which another judge is intimately familiar,” *see* Motion at 8, transferring the
 20 instant action would not centralize all “family separation” litigation in the District of
 21 Arizona or eliminate the possibility of an intra-District conflict.

22 Courts also regularly consider whether cases are at different stages in litigation in
 23 deciding whether to transfer. *See, e.g., Cooke*, 2012 WL 5835401, at *2; *Toomey v.*
 24 *Arizona*, No. CV 20-0335-TUC-SHR, 2020 WL 6149843, at *2 (D. Ariz. Oct. 20, 2020).
 25 One illustrative example is *Cooke*, where the court denied a transfer motion despite finding
 26 that the cases “shar[ed] common legal issues concerning violations of the Fair Housing
 27 Act” and “generally ar[ose] from the same transactions or events.” *Cooke*, 2012 WL
 28 5835401, at *2. Among other things, the court found transfer to be inappropriate because

1 the cases were “at very different stages of litigation,” one being “at the summary judgment
2 stage” and the other “just recently filed.” *Id.* The Court could reach the same conclusion
3 here. The *C.M.* and *A.P.F.* cases are past the motion to dismiss stage, the United States has
4 filed an answer in both cases, the Court has held a case management conference in both
5 cases, the parties have served responses pursuant to the District of Arizona’s former
6 Mandatory Initial Discovery Pilot Program (“MIDP”), and the cases are well into the
7 discovery process. By contrast, this action—like the *F.R.* and *E.S.M.* cases that are also
8 pending in this District—remains in motion to dismiss briefing and would not be subject
9 to the MIDP if discovery commenced. Thus, the Court may wish to consider whether
10 consolidation of this action with *C.M.* and *A.P.F.* is the most efficient manner of handling
11 the actions currently pending in this District.

12 **CONCLUSION**

13 As noted above, the factors set forth in LRCiv 42.1(a) “are not binding on the
14 Court’s ultimate decision to grant or deny” the instant Motion, *Smith*, 2011 WL 4101508,
15 at *1, and the Court retains “broad” discretion regarding the reassignment of cases, *Dishon*,
16 2018 WL 4257936, at *4. For the reasons set forth above, we defer to the Court on the
17 transfer decision.

18 RESPECTFULLY SUBMITTED this 8th day of March, 2022.
19

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CERTIFICATE OF SERVICE

I hereby certify that on March 8, 2022, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrant(s):

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